No. 44719-3-II

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION II

EDWIN D. COE and DONNA B. COE, Husband and Wife,

Plaintiffs/Respondents,

v.

REID NOEL as Guardian ad Litem for Robert M. Noel and Nancy E. Noel, Husband and Wife, and ERIC NOEL as Successor Trustee for the Robert M. Noel and Nancy E. Noel Family Trust,

Defendants/Appellants.

APPEAL FROM WAHKIAKUM COUNTY SUPERIOR COURT
Hon. Michael J. Sullivan

RESPONDENTS' BRIEF

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I. STATEMENT OF THE ISSUES

Whether at partial summary judgment[1], the trial court properly:

a) denied Defendants' Motion to strike Donna Coe's Affidavit in support of Plaintiffs' Motion for Partial Summary Judgment; b) found that the sellers elected not to disclose the extreme erosion on the Seller's Disclosures; c) ruled that one of the Sellers had superior knowledge of the extreme erosion; d) found that the material facts related to the extreme erosion of the property were not readily available to the buyers; e) determined that the sellers had a duty to disclose material facts regarding the extreme erosion and tax revaluation petition to their prospective buyers; and f) granted Rescission in equity as a remedy.

Please note that Appellants have not appealed the trial court's Order Denying Defendants' Motions to Strike although they designated it as a portion of the record[2] and assign it error[3].

II. STATEMENT OF THE CASE

A. Factual Background

Appellants are the successor trustees and guardians of the sellers of

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[1] Appellants did not prepare a Verbatim Report of Proceedings for the hearing on Defendants' Motion to Strike, nor on Plaintiffs' Motion for Partial Summary Judgment hearing of March 6, 2013, arranging only for the transcription of those hearings held on the Defendants' Motion for Reconsideration of April 1, 2013 and the evidentiary hearing of May 20, 2013 which Defendants declined to attend.

[2] CP 688-689

[3] Br. of App. at 1-2

the subject real property (hereafter "Noel").

Respondents are the purchasers of the real property (hereafter "Coe").

The subject property is located on Puget Island, Cathlamet, Washington. CP 15.

The real property was the subject of erosion, described by Noel as a loss of 100 feet, during Noel's ownership. CP 165.

Coe purchased the real property in June 2007. CP 10.

Noel, as sellers of improved real property, completed the Seller's Disclosure required by RCW 64.06.020. CP 140-144.

Noel represented that there were no material damages to the subject property from "...fire, wind, floods, beach movements, earthquake, expansive soils, or landslides..." CP 143.

Months after the sale closed, Coe was notified by the Assessor's Office for Wahkiakum County that Noel had petitioned for a reduction in property value based on erosion loss of 100' feet of river frontage. CP 265.

Coe, upon ascertaining the facts, immediately requested non-judicial rescission as a remedy through Noel's prior counsel, Thomas Doumit. CP 703. Noel agreed to rescind, but then hired new counsel and denied rescission, at which point Coe promptly filed suit in the superior

court seeking relief. CP 7-35.

During the course of litigation, Noel answered interrogatories affirming that they had knowledge of the erosion loss, that Nancy Noel participated in an ad hoc Erosion Control Advisory Panel, and that they chose to not disclose the erosion to Coe. CP 165, 683. They also confirmed that they personally met with Coe prior to the sale on the same date that Coe accepted the disclosures. CP 173.

Nancy Noel testified in her Affidavit that she made the choice not to disclose the erosion even though she knew of its existence. CP 43.

After refusing to attend scheduled depositions, Noel's son, Eric, alleged that the principal sellers were incompetent and/or were of such mental state that precluded them from further participating in the litigation. CP 963-966.

B. Procedural Background

Coe filed this action in January 2008 after Noel withdrew their verbal agreement to rescind the sale. CP 703.

Contentious litigation and motions practice ensued between the parties, including Defendants' Motion for Summary Judgment which was denied and hearings which included the revelation of misrepresentations by the Defendants; see, for example, their affirmative statements of *competency* in affidavits [CP 42-90] in the underlying case, and later

claims of *incompetency* after Defendants failed to appear at scheduled depositions. CP 954-962.

Additional litigation was required to obtain a legal determination regarding damages, the alleged incompetency of the Defendants and to resolve additional misrepresentations by the Defendants' son, Eric Noel, who affirmatively represented that he was the Attorney-in-fact for the Defendants when he was not. CP 116.

Later, a determination was made that neither Seller/Defendant would be competent to be deposed or to testify as to their personal knowledge of the facts at issue in the action.

Ultimately, Coe moved for partial summary judgment, on material facts which were not in dispute, and the trial court granted the motion and ordered that Buyer/Plaintiffs were entitled to move for judgment. CP 118-186, 690-94.

Judgment for equitable rescission, including prejudgment interest and legal fees and costs, was granted after hearing on March 6, 2013 and, after an evidentiary hearing to determine the Buyer's costs, the reasonable rental value of the subject property and reasonable attorney fees and costs, the court entered the Amended Judgment on May 20, 2013. CP 832-34, 951-53.

III. ARGUMENT

A. Standard of Review

In this case, the trial court was asked to determine questions of law, specifically, "Did the sellers have knowledge of, and a duty to disclose, the material facts pertaining to the extreme erosion during the course of the sale transaction and did they fail to do so?" These questions are reviewed *de novo*. *Jongeward v. BNSF Ry.*, 174 Wn.2d 586, 592, 278 P.3d 157 (2012) (citing *State v. Breazeale*, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001)).

To the extent that factual issues are considered, they are considered in the light most favorable to the nonmoving party. *Dowler v. Clover Park Sch. Dist. No.*, 400, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c)."

A material fact is one upon which the outcome of the litigation depends in whole or in part." *Atherton*, 115 Wash.2d at 516, 799 P.2d 250 (citing *Morris v. McNicol*, 83 Wash.2d 491, 494, 519 P.2d 7 (1974)). Any doubt about the existence of a genuine issue of material fact is resolved against the moving party. *Atherton*, 115 Wash.2d at 516, 799 P.2d 250.

1. To defeat summary judgment, Defendants must set forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact. [4]

The Defendants appeal the Judgment and Order Granting Rescission entered March 6, 2013 as subsequently amended on May 20, 2013. The Amended Judgment stems from an Order Granting Partial Summary Judgment entered on January 22, 2013.

The evidence submitted by the parties included affirmative representations made in the Noels' Petition to the Board of Equalization CP 165, the findings and Order from the Board of Equalization determining that there was "extreme erosion" CP 276, the Order Dismissing the Assessor's Appeal of Board of Equalization findings CP 676-677, the Seller's Disclosure (Form 17) CP 140-144, Affidavit of Nancy Noel CP 43, and Noels' Answers to Interrogatories CP 165. There has been no objection to the admissibility of this evidence and the representations made therein are uncontroverted and support the trial court's findings.

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[4] Pursuant to *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986), the Defendants are obligated to set forth specific facts which rebut the Plaintiffs' contentions and must disclose the existence of a genuine issue as to a material fact.

All of the evidence indicates that the sellers were aware of, and acted upon, the knowledge that the subject real property suffered extreme erosion, that even 10 years later, the sellers believed the impact of that erosion to be so significant as to warrant a reduction in assessed value and that the sellers chose not to disclose the material damage to the real property from flood and beach movement. That the sellers had knowledge of the extreme erosion is undisputed.

Defendants have not appealed the applicable findings or sought to strike the answers to interrogatories, the Affidavit of Nancy Noel, the sworn statement of Robert & Nancy Noel contained in the Petition to the Board of Equalization or the Seller's Disclosure Form 17.

2. Material facts presented at summary judgment must be refuted by competent evidence and not speculation or argumentative assertions.

This court's review of the summary judgment is limited to the evidence and issues presented to the trial court. *Bldg. Indus. Ass'n. of Wash. v. McCarthy*, 152 Wn. App. 720, 733-34,218 P.3d 196 (2009). The nonmoving party may not rely simply on speculation or his own argumentative assertions that disputes of fact exist[5]. *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 377, 972 P.2d 475 (1999). Rather, the

[5] *e.g.*, adverse counsel citing himself in his contrived 'Concise Statement of Facts' CP 209-516

nonmoving party must present "competent evidence by affidavit or otherwise[6]." *Id.* at 735. If the nonmoving party fails to create a genuine issue of fact, then the trial court should grant the movant's motion for summary judgment. *Id.*

The undisputed facts presented are:

a) The sellers had knowledge of the extreme erosion due to flood and beach movement, CP 271

b) The duty to disclose was created by statute, independent of the contract; and

c) The sellers did not disclose the extreme erosion to the buyers. CP 43, 165, 183.

B. The Trial Court Did Not Err in Considering the Affidavit of Donna Coe.

It is with no small amount of irony that Appellants argue that Donna Coe's affidavit did not recite that she is competent to testify in these proceedings. Of the four involved parties (Edwin & Donna Coe and Robert & Nancy Noel), Donna Coe is the sole remaining party who remains competent to testify in these or any proceedings, as the other three

[6] Appellant incorrectly asserts that the trial court had the affidavit of Toni Robinson before it at hearing. Br. of App. at 19 (fn 4). The partial summary judgment order is entered into the record at CP 690-94. Toni Robinson's affidavit was not filed until after the summary judgment order was entered. CP 718-28, and thus the trial court would not have considered it. The same is true of Appellants' reference to the Affidavit of Calvin Hampton which was not before the trial court at summary judgment. CP 827-31. Br. of App. at 27.

have been rendered incompetent by emotional frailty, illness or disease. CP 121.

The trial court's decision to deny the Defendants' Motion to Strike her affidavit was supported by ER 104 (a, b) and most obviously by ER 601 and the evidence submitted in her affidavit was not only submitted and acknowledged by the Defendants as being a portion of the record, but qualify as exceptions from the hearsay rule. ER 803(14, 15).

Under CR 56(a), a party seeking summary judgment may move, with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." In the present case, Coe filed with the court the Donna Coe Affidavit. CP 118-174. The affidavit complied with CR 56(e), which provides in pertinent part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. CR 56(e).

Coe's statement is sworn. CP 118. In that sworn statement, she states that she makes the affidavit "on the basis of [her] personal knowledge." CP 118. She further demonstrates her competency by clearly testifying to the matters stated therein, explaining in the affidavit those specific matters of relevance within her personal experience, identifying

the evidence for admission, and recounting her personal experiences with the documents and the parties during the transaction.

Lack of Personal Knowledge is defined by the Rules of Evidence as:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. ER 602.

Defendants set forth no evidence disproving her personal knowledge of the matters she described in her affidavit, in which she submitted documents supporting partial summary judgment, and matters of relevance within her personal experience, and recounting her personal experiences with the documents and the parties during the transaction. The trial court did not err in not striking her affidavit. RCW 5.28.010 provides:

> Every court, judge, clerk of a court, state-certified court reporter, or notary public, is authorized to take testimony in any action, suit or proceeding, and such other persons in particular cases as authorized by law.

RCW 5.28.060 states:

> Whenever an oath is required, an affirmation, as prescribed in RCW 5.28.050 is to be deemed equivalent thereto, and a false affirmation is to be deemed perjury, equally with a false oath.

Coe made her affidavit on oath and executed it in the presence of a notary public who acknowledged that it was duly sworn and subscribed by Coe. CP 121-2.

Ironically, the Defendants acknowledged the relevant evidence on the record by asserting in their motion to strike:

> "...Although Plaintiff has failed to authenticate the included exhibits as required, it appears that they are already in the record. Defendants cannot at this time see any reason why they should not be admitted." CP 620-21.

This affidavit is also properly before the court because a trial judge is presumed to know the rules of evidence and is presumed to have considered only admissible evidence. *In re. Harbert*, 85 Wn.2d 719, 729, 538 P.2d 1212 (1975).

The trial court properly denied the defendants' motion to strike Donna Coe's affidavit because there was no issue of incompetence; the allegations that she had manufactured statements are disproven by the record CP 652-53, 673, 683; and the evidence submitted was already before the court and would have been admissible at trial. There was no prejudice to the defendants in not striking the affidavit. *Discover Bank v. Bridges*, 154 Wn.App. 722, 226 P.3d 191 (2010). A court's decision to admit or exclude evidence lies within its sound discretion and evidentiary rulings will not be overturned unless the trial court has manifestly abused its discretion. *State v. Bourgeois*, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997).

In this case, the trial court made a decision not to strike the

affidavits and Appellants make no showing as to why the evidence presented would be inadmissible at trial, or on what part of her Affidavit the trial court relied to make its determination which would have otherwise been inadmissible.

Appellants next advance the position that only four statements in the subject affidavit contained facts (¶¶ 3, 4, 7 & 12), which Appellants then claim to be untrue. An examination of those particular statements of fact reveal not only that they are verifiable, but that they are uncontroverted.

The factual statement in ¶ 3 in Donna Coe's affidavit was:

> "Prior to purchasing the property, on May 10, 2007, my husband and I met with Mr. & Mrs. Noel in their home at 72 E. Sunny Sands, to review the Seller's Disclosure form." CP 119.

The portion of the Coe Deposition referenced by Appellants to challenge the affidavit is part of a series of questions related specifically to the title report and not the Seller's Disclosure Form. The Defendants allege this to be a manufactured assertion designed to create facts for the purpose of supporting the Plaintiffs' Motion; however, the trial court was able to consider corroborating evidence regarding the interrogatory answers of the Defendants. CR 56(c). In particular, the interrogatories propounded by Plaintiffs to the Defendants and answered on October 23,

2008:

> INTERROGATORY NO. 19: Describe in detail each conversation that the Plaintiffs have had with the Defendants from the first contact to the present date as follows:
>
> a) Date and time;
> b) Where the conversation occurred;
> c) Who was present during the conversation;
> d) Whether the conversation was in person or by telephone; and
> e) With particularity, all matters discussed in each conversation.
>
> ANSWER: Defendants acknowledge that they had a conversation with plaintiffs when plaintiffs personally inspected the property on May 10, 2007, and recall that the plaintiffs inspected the river front and waterline, but cannot at this time recall the specifics of that conversation. CP 673.
>
> [...]
>
> INTERROGATORY NO. 23: Was there ever any communication with the Plaintiffs from you or your agents as to the movement of the outbuildings and irrigation system as a result of erosion?
>
> ANSWER: Defendants do not at this time recall having discussed the movement of any outbuildings or the irrigation system with plaintiffs. [...] CP 683.
>
> INTERROGATORY NO. 25: During your possession of the subject property, did you relocate any structures on your lot? If your answer is in the affirmative, please state:
>
> a) Which structure was moved;
> b) The reason for the relocation; and
> c) The approximate time and date when you moved the structure.
>
> ANSWER: Yes, the tool shed, which might have been built on dredge spoils, was moved back from the river during the summer of 1997 to protect the shed from the possibility of another flood, following the flood of 1996. CP 683.

Donna Coe's representation that she and her husband met with Mr.

& Mrs. Noel on May 10, 2007 was affirmed by the Noels in October 2008, while the defendants were still competent to answer discovery requests. The Noels affirmed that there had been a flood, that they had no recollection of having disclosed the erosion, and that they had moved their shed back from the river.

Moreover, Nancy Noel had previously represented to the trial court that she had petitioned for a reduction in assessed value based on the event of significant erosion due to a flood. CP 43. And in what Appellants now refer to as their "successful tax appeal" the Noels asserted the flood, erosion and subsequent movement of outbuilding and irrigation in their petition to the Board of Equalization. CP 271.

Similarly, in ¶4 of Donna Coe's affidavit, there is no evidence which controverts her assertion that the Noels answered the Sellers Disclosure Form No. 17 question, regarding surveys that adversely affected the property, in the negative[7]. CP 140. Nor do Defendants provide any evidence or testimony that the Noels' Disclosures included any affirmative representation regarding the material damage to the property by way of "[...] fire, wind, floods, beach movement, etc." CP 143.

[7] The surveys referenced by adverse counsel are regarding neighboring properties; not the subject real property, and were not provided by the defendants.

There is no controversy here, and the Appellants have not challenged the veracity or authenticity of the Defendant/Seller's Answers on Form 17 which was already before the trial court.

¶7 of Donna Coe's affidavit also recited evidence before the trial court by referring specifically to the Plaintiff/Buyers' reliance upon, and acceptance of, the Seller's Disclosures by waiving their contingencies. CP 118-124. While the initial offer had been made on May 7, 2007, it was contingent on receipt of the statutory disclosures, inspections and standard industry practices. CP 140-144. May 10, 2007 was the date on which lead paint disclosures and the Form 17 Disclosures were provided to and accepted by the buyers. CP 140-144. There is no dispute that the purchasers had the statutory right to abandon their interest in purchasing the property in the absence of receipt of the statutory sellers' disclosures. RCW 64.06.030; but that was not the issue before the court.

¶ 12 of Donna Coe's Affidavit recites facts corroborated by the defendants in discovery, including their specific statements that Nancy Noel was a member of the Erosion Control Advisory Panel, that the sellers did not recall any conversations with *their* real estate agent regarding the erosion, the Sellers' assumption that the Plaintiffs' real estate agent knew about the extreme erosion, and knew about the undisputed fact that the movement of an outbuilding was necessitated by flood. CP 43, 683.

These statements by Donna Coe are consistent with Plaintiffs assertion that the Defendants did not disclose the flood or subsequent erosion in the Sellers Disclosure, and there is no indication that the trial court erred in considering these undisputed facts.

Therefore, the relevant assertions in Donna Coe's Affidavit are uncontroverted and the Defendants did not meet the burden of providing competent evidence rebutting the specific facts and disclosing a genuine issue as to any of these material facts. The trial court properly denied the Defendants' Motions to Strike and later Motion for Reconsideration.

C. The Trial Court Did Not Err in Considering the Declaration of Ken Ingalls.

The excerpt of the Plaintiffs' real estate agent, Ken Ingalls, deposition cited by the Appellants does not conflict with the Affidavit of Donna Coe nor raise any question of fact. Ingalls was asked if the Purchasers ever met with the Sellers independently and without his presence. Ingalls simply replied that he did not know and if they did he had no knowledge of it. CP 651, 662-3.

Defendants cite to no portion of the record where Ingalls was ever asked if he was present when the Purchasers and Sellers met on May 10, 2007.

Defendants provide no evidence which calls into question their

own Answer to Interrogatories in which they state that they did, in fact, meet with the Purchasers on May 10, 2007.

E. The Trial Court Did Not Err in Finding that the Sellers' Sought & Obtained a Reduction in Assessed Value Based on the Extreme Erosion.

Appellants' brief presents a novel argument, unsupported by the direct representations of Nancy Noel: namely, that the trial court erred in finding that the tax relief petition, which was submitted to the Board of Equalization by Noel, was intended to reduce the tax value of the property.

The subtle nuance which Appellants ask this court to consider is whether or not the trial court should have found that the petition was intended merely to "limit a proposed increase." But the trial court specifically took into consideration the Affidavit of Nancy Noel in which she states:

> "In 2006, I petitioned the Wahkiakum County Board of Equalization to reduce the assessed value of the land, based on the fact that in 1996 that we had lost a portion of it due to erosion. The County reassessed the land value downward..." CP 43.

Further, the trial court took the findings and order of the Board of Equalization into consideration which stated that the evidence provided [by Noel] indicated loss of property due to the "extreme erosion" of land and represented to the Board of Equalization that the total value was only $200,000. CP 271, 276.

D. The Trial Court Did Not Err in Finding That the Sellers' Had Knowledge of the Extreme Erosion, and That Their Knowledge was Superior to That of the Purchasers.

In Washington, the court will find a duty to disclose where the court can conclude there is a quasi-fiduciary relationship, *Boonstra v. Stevens-Norton, Inc.*, 64 Wash.2d 621, 393 P.2d 287 (1964), [...] where a seller has knowledge of a material fact not easily discoverable by the buyer, *Sorrell v. Young*, 6 Wash.App. 220, 491 P.2d 1312 (1971), and where there exists a statutory duty to disclose, *Kaas v. Privette*, 12 Wash.App. 142, 529 P.2d 23 (1974) (see also *Clausing v. DeHart*, 83 Wash.2d 70, 515 P.2d 982 (1973)).

The court can find, as a matter of law, that when one fails to reveal material facts within one's knowledge when there is a duty to speak, the failure to disclose being, in effect, a representation of the nonexistence of a fact which is not disclosed. *Oates v. Taylor*, 31 Wash.2d 898, 199 P.2d 924 (1948)[8]; *Boonstra v. Stevens-Norton, Inc.*, 64 Wash.2d 621, 393 P.2d 287 (1964).

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[8] On the subject of withholding material information, this court quoted in *Oates v. Taylor*, 31 Wn. (2d) 898, 199 P. (2d) 924: "It is well settled that the suppression of a material fact which a party is bound in good faith to disclose is equivalent to a false representation. Where the law imposes a duty on one party to disclose all material facts known to him and not known to the other, silence or concealment in violation of this duty with intent to

1. Sellers' Are Equitably Estopped From Claiming They Did Not Have Actual Knowledge of the Material Damages by Flood and Erosion.

In this case, the sellers had knowledge of material facts which were **not** easily discoverable by the Plaintiff/Buyers. CP 43, 165, 683. That knowledge alone would not have obligated them to disclose the material facts to the purchasers, but the statute required **at a minimum** that they disclose the particular material facts at issue in this action. RCW 64.06.030.

The doctrine of equitable estoppel rests on the principle that a person "...shall not be permitted to deny what he has once solemnly acknowledged." *Arnold v. Melani,* 75 Wash.2d 143, 147, 449 P.2d 800 (1968). The sellers cannot now deny that they had actual knowledge of the material facts because they acted on their knowledge by moving structures on the property, participating in an *ad hoc* Erosion Control Advisory Panel, petitioning ten years later to reduce the value of the property based on evidence and/or testimony in a proceeding before the Board of Equalization which established that there was extreme erosion

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deceive will amount to fraud as being a deliberate suppression of the truth and equivalent to the assertion of a falsehood. The concealment of a fact which one is bound to disclose is an indirect representation that such fact does not exist, and constitutes fraud." 37 C.J.S. 244, Fraud, § 16a.

resulting from a flood (presumably occurring in 1996 that still affected the value of the real property in 2006).

2. The Facts Pertaining to the Erosion Were Peculiarly Within the Knowledge of the Sellers.

Notwithstanding Appellants assertions, there were no surveys of record commissioned by the sellers which provided evidence of the flood-induced erosion of the subject property and their answers to Form 17 stated there were no surveys which adversely affected the property. CP 144-161. Further, there is no evidence that the documents pertaining to the sellers' petition to the Board of Equalization were readily available; in fact, it is acknowledged that a public disclosure request was required in writing to obtain copies of documents from the BOE. The Appellants nowargue that the drawing attached to the title report "...appeared to show the encroachment onto it by the river." Br. of App. at 26. However that sketch was provided stated at the top:

> "To assist in locating the premises. It is not based on a survey, and the company assumes no liability for variations, if any, in dimensions and location."

This is common practice by title companies and in no way places a borrower on notice of a material defect in the real property, or indicates boundary lines, encroachments, landslides, erosion or other such

occurrences and in this case, does not even demarcate the subject property by sellers' name or any arrow pointing it out.

The Appellants have provided no evidence that the Board of Equalization has a local office or that it has records readily available to the public, or more than just a post office box for inquiries. The Noels' appeal was not public knowledge. The county's appeal of the BOE decision was rendered by the State Board in Olympia, Washington on March 22, 2007. CP 276. The parties receiving notice of the Board's disposition were identified as the Noels. CP 277.

Defendants wrongly assume that, absent a special relationship such as a fiduciary relationship, "parties engaged in an arm's length transaction do not have a duty to disclose." The duty to disclose does not arise solely within fiduciary duty relationships. While "...some type of special relationship must exist before the duty will arise" in accordance with *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 732, 853 P.2d 913 (1993), the duty to disclose in a business transaction arises if imposed by a fiduciary relationship or other similar relationship of trust or confidence or *if necessary to prevent a partial or ambiguous statement of facts from being misleading. Van Dinter v. Orr*, 157 Wn.2d 329, 334, 138 P.3d 608 (2006) (citing *Colonial Imports*, 121 Wash.2d at 731) (emphasis

added). The *Van Dinter* court explained that the duty to disclose can arise (as here) when one party has facts difficult for the other party to obtain.

The court in *Colonial Imports* endorsed the notion that the duty arises when the facts are peculiarly within the knowledge of one person and could not be readily obtained by the other. *Id.*

Further, the court will find a duty to disclose where [...] a seller has knowledge of a material fact not easily discoverable by the buyer, and where there exists a statutory duty to disclose. *Favors v. Matzke,* 53 Wash.App. 789, 770 P.2d 686, 796, review denied, 113 Wash.2d 1033, 784 P.2d 531 (1989).

Here, it remains undisputed that the sellers had knowledge of the extreme erosion and flooding. CP 271. In Nancy Noel's affidavit, she testifies that she knew the facts pertaining to the flood and erosion. She states there was a flood that materially damaged the property by removing 100 feet of beach frontage during the course of her ownership. CP 43.

F. The Trial Court Did Not Err In Finding That the Sellers Had a Statutory Duty to Disclose.

In Washington, the court will find a duty to disclose where [...] a seller has knowledge of a material fact not easily discoverable by the buyer, *Sorrell v. Young,* 6 Wash.App. 220, 491 P.2d 1312 (1971), and where there exists a statutory duty to disclose, *Kaas v. Privette,* 12

Wash.App. 142, 529 P.2d 23 (1974) (see also *Clausing v. DeHart*, 83 Wash.2d 70, 515 P.2d 982 (1973)). Here the finding of fiduciary relationship was unnecessary and not central to the trial court's holding because the duty to speak was established by the sellers' knowledge of a material fact affecting the transaction which they were required by statute and common law to disclose, and which they failed to disclose.

1. The Statute Created a Duty To Disclose the Flood, Erosion, Material Damage, and Studies, Etc. Which Adversely Affected the Real Property.

In 1994, the Washington legislature adopted chapter 64.06 RCW. RCW 64.06.030 creates the power of rescission and requires sellers of improved residential real property to deliver to buyers a completed seller disclosure statement. The minimum contents of these statements are mandated by statute. *See* RCW 64.06.020(1).

> In a transaction for the sale of improved residential real property, the seller shall, unless the buyer has expressly waived the right to receive the disclosure statement under RCW 64.06.010, or unless the transfer is otherwise exempt under RCW 64.06.010, deliver to the buyer a completed seller disclosure statement in the following format and that contains, ***at a minimum***, the following information... (emphasis added)

There is no ambiguity in the plain language of the statute as to what a seller is obligated to disclose to a purchaser. The statute unambiguously states that "...at a minimum" the seller is to disclose, in

relevant part:

> "§1*G. Is there any study, survey project, or notice that would adversely affect the property?" and
>
> " §7 *C. Is there any material damage to the property from fire, wind, floods, beach movements, earthquake, expansive soils, or landslides?

The sellers answered 'no' to both queries, yet do not deny that they knew of the extreme erosion loss of 100' of beach due to a flood. CP 271. They do not deny that they asserted that damage was so severe that it affected the value of the real property even ten years later. CP 271. They don't deny that they were obligated to complete the Seller's Disclosure. CP 140-144.

The duty imposed on the Defendant/Sellers by the statute required that specific disclosures be made pertaining to improved real property.

It arises from RCW 64.06.020 as a statutory duty. The statutory language at ¶(3) states that this duty to disclose is not to be considered part of any written agreement between the buyer and seller. It is, therefore, a duty which arises independent of the contract. *Eastwood*, 170 Wash.2d at 387. The *Eastwood* court recognized that duties based either on statute and common law or statute alone are independent of the contractual duties of the parties.

The operation of RCW 64.06.020 is the pivotal point in this

litigation. Had the disclosure been made accurately, based upon what the sellers' undisputedly knew, the burden would have shifted to the purchasers to inquire further and fully satisfy themselves as to the stated disclosure. That never occurred. The burden never shifted because the Noels willfully failed to disclose material defects and their petition for relief. Absent the disclosure, the purchasers had no opportunity or obligation to go beyond the readily discoverable information pertaining to the real property.

Without authority, the sellers' appointed representatives (their sons), neither of whom aver personal knowledge, and one of whom has attempted by affidavit, to deny the sellers' duty. CP 517-536. Appellants admit that they *would have had* the duty to disclose the material facts regarding the erosion *had they been asked*[9]. In reality, that exact inquiry was made by operation of the statute. The facts later discovered were that, not only did the sellers have personal knowledge of the flood-caused erosion, but that they had acted upon that knowledge within a year of selling the property to the buyers.

G. The Trial Court Did Not Err In Finding The Sellers Liable for Claims Arising From Representations In the Form 17 Disclosures.

The defining characteristic in this case which distinguishes

[9] Br. of App. at 23

Alejandre v. Bull is that in *Alejandre*, the seller actually disclosed that she had trouble with the septic, that she had it pumped, and that it appeared to be working. That disclosure triggered the purchasers' obligation to inquire further. It was only because the purchaser learned that the seller had encountered a problem in the past, that the purchaser needed to further inquire and inspect. Unlike this case, the seller's disclosure of the historic problem was sufficient to put the buyers on notice to inspect and satisfy themselves.

Similarly, the courts have held that disclosure of a defect which would not otherwise be readily ascertainable, triggers the obligation on the part of the buyer to further inquire. For example, in *Puget Sound Service Corporation v. Dalarna Management Corporation*, 51 Wn. App. 209, 752 P.2d 1353 (1988) since the sellers had made the disclosures that they had dealt with past leak problems, and the purchaser didn't further inquire despite having been placed on notice of the potential defect, the seller could not be held liable.

Here, we have a distinctly different set of facts which include the undisputed reality that the sellers did have *actual knowledge* of the flooding and extreme erosion caused by it, that one of the sellers participated in the governmental Erosion Control Advisory Panel for the community, that both sellers acted upon their knowledge to seek and

receive tax relief within one year of selling the property to the purchasers, and sellers failed to disclose any hint of such events to the purchasers when specifically asked on the Form 17. CP 140-144.

Since Noels affirmatively asserted that their property was materially damaged by flood and erosion in their petition for reduction of assessed value to the Board of Equalization, Appellants are estopped from denying it in the case at hand. Since they represented to their buyers in the Form 17 disclosures that there were no material damages from fire, flood, winds, beach movements, earthquakes etc., it distinguishes their non-disclosure from the cases cited by Appellants and the buyers' common law remedy of rescission is not foreclosed. CP 140-144.

One of the cases oft cited by Appellants is the *Jackowski* case. However, that case supports the Plaintiff/Buyers. The *Jackowski* court stated:

> RCW 64.06.050(1) provides that "[t]he seller shall not be liable for any error, inaccuracy, or omission in the real property ... disclosure statement ***if*** the seller had no *actual knowledge* of the error, inaccuracy, or omission." [unlike this case – emphasis added]
>
> Although RCW 64.06.030 permits buyers to rescind an offer within three days of receiving the disclosure statement, the statute does not explicitly bar buyers from seeking remedies, including rescission, at a later date if they *discover negligence* or [174 Wn.2d 737] *intentional misrepresentations*. [like this case – emphasis added]

> The Borchelts read the aforementioned provisions together to mean that the common law was retained except in situations, such as they claim here, where the seller lacked adequate knowledge relating to Form 17 disclosures as provided in RCW 64.06.050. We agree with the Borchelts that to the extent the Jackowskis base their request for rescission on negligent misrepresentation under RCW 64.06.050(1), they must show *actual knowledge*, as the statute indicates. [emphasis added]

The court went on to hold in ¶ 29:

> The Borchelts also argue that the Jackowskis are not entitled to common law rescission because they are limited to the statutory rescission right created in RCW 64.06.030. We disagree. It is true that RCW 64.06.030 establishes a right of rescission that must be exercised, if at all, within three days of the buyer's receipt of the disclosure statement. If the buyer does not exercise the right to rescind within the time limit, the disclosure statement is considered approved and accepted. RCW 64.06.030. However, as we noted, RCW 64.06.030 supplements the common law rights of buyers; it does not displace those rights. See RCW 64.06.070 ("nothing in this chapter shall extinguish or impair any rights or remedies of a buyer of real estate"). A buyer is, therefore, entitled to pursue common law remedies, including common law rescission, outside of that three-day period. *We hold that the Court of Appeals was correct in holding that chapter 64.06 RCW does not bar a common law rescission action based on misrepresentations in the Form 17 disclosures.* [emphasis added]
>
> *Jackowski v. Borchelt*, 174 Wn.2d 720, 278 P.3d 1100, 1108 (2012).

In the underlying case and again in Appellants' Opening Brief, Appellants attempted to mislead the trial court by representing that the surveys disclosed by the Plaintiffs' preliminary title search, none of which

were of the subject property, were sufficient to place the buyers on notice of the extreme erosion. The surveys were of the neighboring properties which didn't indicate the erosion loss of the subject property and the Sellers specifically answered "no" on the Form 17 to the questions: (1)(F) "Is there any study, survey, project or notice that would adversely affect the property?"

Appellants further argue that the Plaintiffs were placed on notice of the loss of 100 feet of river frontage by the title report reference to the easement for Dredge Disposal and Right of Entry which, on its face, states that its purpose was to "preserve the property from loss due to erosion." CP 168. There was no language in the easement nor any marked indications on the surveys which would have placed the Coes on notice regarding a problem with the subject lot. The easement was not for any other purpose of mitigating any damages; rather, preservation of the property from any potential damages. CP 168.

H. The Trial Court Did Not Err In Granting Rescission.

An action to rescind a contract is ***not*** limited to intentional fraud, but may also be based on false representations which were negligently or recklessly made, even if believed by the declarant to be true. Such statements must be shown to have materially induced the damaged party to enter into the contract. *Gronlund v. Andersson,* 38 Wash.2d 60, 227

P.2d 741; *Lou v. Bethany Lutheran Church of Seattle,* 168 Wash. 595, 13 P.2d [353 P.2d 437] 20.

It is settled beyond dispute that Superior Courts, exercising equity powers, have full jurisdiction to grant relief by ordering Rescission, cancellation, or delivery up of deeds, mortgages, contracts, and other written instruments, and that the granting of such relief is controlled by equitable principles. *Hornback v. Wentworth,* 132 Wn. App. 504 (2006).

In determining whether a case is primarily equitable in nature or is an action at law, the trial court is accorded wide discretion, the exercise of which will not be disturbed except for clear abuse. *Brown v. Safeway Stores,* 94 Wash.2d at 368, 617 P.2d 704.

Rescission is an equitable remedy and requires the court to fashion an equitable solution. *Busch v. Nervik,* 38 Wash.App. 541, 687 P.2d 872 (1984). The solution should attempt to restore parties to the relative positions they would have occupied if no contract had ever been made. It constitutes an abrogation or annulment of a contract and requires the Court to fashion a remedy to restore the parties to the relative positions they would have occupied if no contract had ever been made. The circumstances of each particular case must largely determine what is necessary for one party to do in order to place the other in status quo. *Rummer v. Throop,* 38 Wash.2d 624, 231 P.2d 313 (1951); *Hopper v.*

Williams, 27 Wash.2d 579, 179 P.2d 283 (1947); *Hackney v. Sunset Beach Investments,* 31 Wash.App. 596, 644 P.2d 138 (1982); *Taylor v. Balch Land Dev. Corp.*, 6 Wash.App. 626, 495 P.2d 1047 (1972).

Washington has long recognized that in a Rescission action, the parties, insofar as practicable, are to be restored to the same position they were in before the contract was made. *Yount v. Indianola Beach Estates, Inc.*, 63 Wash.2d 519, 524-25, 387 P.2d 975 (1964); *Hunt v. Marsh,* 40 Wash.2d 531, 536, 244 P.2d 869 (1952); *Hackney v. Sunset Beach Investments*, 644 P. 2d 138 (1982).

Here, the Plaintiffs paid $410,000 cash for the property despite the Appellants representation to the Board of Equalization that the fair market value was much less. CP 124, 271. There is no mortgage debt on the property and the parties can reasonably be placed back into their pre-contract position.

Appellants overstate the home improvements made by the Buyers and argue that the electrical wiring that was replaced, the removal of a dilapidated and unsafe loft, and the replacement of old and worn cabinets preclude the Plaintiffs from obtaining rescission as relief. However, the record reflects that the work did not involve substantial changes and the electrical wiring was inspected and approved. CP 890-892, 893-894, 905-908, 909-911.

The Plaintiffs have remained in possession of the subject property for the duration of this action and they had the right to make necessary improvements. *See*, e.g., *Crawford v. Smith*, 127 Wash. 77, 79, 219 P. 855 (1923)). There is no evidence before the court that these improvements in any way diminished the property value.

Appellants argue that the Plaintiffs waived rescission as relief because Defendants (rather than Plaintiffs) filed a motion to prevent the action from being procedurally dismissed by the clerk of the court. The Defendants do not deny that Edwin Coe was battling cancer and negotiations (although fruitless) were underway. Nor do the Defendants deny or bring any evidence which disputes that the buyers immediately sought rescission when they learned about the undisclosed extreme erosion and devaluation petition. CP 703.

The Appellants suggest to this court that the buyers did nothing to preserve their claim for rescission; yet the action itself is proof to the contrary and this issue was extensively addressed in Plaintiffs' Memorandums. CP818-26, 859-71. Coes promptly filed the action in the court of proper jurisdiction to preserve their claim and maintained it despite severe illness of one Plaintiff and at the insistence of Defendants who refused to negotiate in good faith.

I. Appellants' Case Law Distinguished.

Appellants offer several string cites of cases which are either irrelevant altogether or refer to rules or court holdings based on fact patters inapposite to the facts of this case. For example, Appellants argue waiver, citing Washington's adoption of the *Grymes* rule in the drayage case of *Aurora Land Co. v. Keevan*, 67 Wash. 305, 310 (1912), however, the facts of that case do not parallel those in the action at bar.

In *Aurora*, the parties contracted for the purchase of horses, wagons and peripheral equipment. Upon finding that the horses and drayage outfit were in disrepair, the buyer went ahead and used them In fact, the *Aurora* case was filed by the holder of the promissory note, and only in defense against a collection action did the purchasers assert that the wagons, teams and harnesses bargained for were not of sufficient value to warrant the balance owed on a promissory note. Those plaintiffs did not seek to rescind the contract despite their knowledge of the condition of the draying outfit for many months. *Id* at 309-310.

The seminal case 1876 case of *Grymes v. Sanders*, 93 U.S. 55 (1876) cited by Appellants in support of their waiver argument proved to be entertaining reading but, unfortunately way off base on its face. The court stated the legal issue was mistake, and the mistake was the apparently innocent misidentification by a helpful neighbor as to the

location of what the court referred to as "speculative property" believed to contain gold ore. The case involved multiple parties, hearsay and ironic testimony, including references to the value of gold ore *"before the war"* (the Civil War, that is).

In summary, the court took notice of the land sellers' innocence as the buyer relied on the seller's representative's understanding of the mistaken location of the subject property by the neighbor. The case has nothing to do with non-disclosure and examined rescission as a remedy for mistake. The court held that the buyers (speculators) were not entitled to rescission because they failed to act after a different neighbor pointed out the mistake and they chose to wait two years to file suit. The court also found that "...the subsequent conduct of the buyers showed that the mistake had no effect upon their minds for a considerable period after its discovery and then seemed to be more a pretext than a cause (of action)."

To the extent that the case has any relevance to this matter, it supports Coes who, unlike *Sanders, et al*, acted promptly to assert their right of rescission consistent with the rule propounded by *Grymes* that stated, "Where a party desires to rescind upon the ground of mistake or fraud, he must upon discovery of the facts, at once announce his purpose and adhere to it." *Id.* Notwithstanding, Appellants conjecture, Coes never withdrew their complaint nor suffered dismissal.

The next ancient case cited by the Appellants is *McLean v. Clapp* 141 U.S. 429 (1891). This case is of no help to them because it involves the attempted repudiation of a settlement agreement made fifteen years before and after parties had acted pursuant to the settlement agreement.

This case was brought by the seller of a business in 1855. The transaction was an installment sale where, after non-performance by the buyer, the seller sued for judicial foreclosure but settled for some cash and new security for notes receivable. Then, as if awaking from a trance, the seller/note holder "...moved to set aside the settlement and foreclose the (original) mortgage as though it still remained security for the original notes."

The court held there that "...if he desired to rescind the contract, his duty was to return what he had received and repudiate wholly and forever the transaction." This is, of course, exactly what the Coes have attempted to do since they discovered the Noels non-disclosure in 2007.

Plaintiffs/Respondents first tried informal negotiations and then litigation when the Appellants reversed their verbal rescission agreement which had been communicated by their counsel to the undersigned. As per the *McLean* decision, the Coes remain poised to return "what they received" (in better condition) to the sellers and repudiate wholly and forever the transaction with the Noels.

Another case which fails to support the Appellants waiver argument is that of *Gorge Lumber Co. v. Brazier Lumber Co.* 6 Wn.App. 327 (1972). There, the parties with full knowledge of their history of breach, entered into a written agreement which modified their contract and operated to waive the rescission rights under the initial contract. There is no such agreement in the present action. In fact, there has never been any agreement upon which the Coes have acted which would operate to waive their rescission rights.

Likewise, *Brown v. VanTuyl*, 40 Wn.2d 364 (1952) is inapposite because the parties purchased a boat, the purchaser became aware of the structural defects and renegotiated the contract rather than rescinding it.

Another interesting but palpably not square with Coe v. Noel is the case of *Blake v. Merritt*, 101 Wash. 56, 171 Pac. 1013. Blake has nothing to do with non-disclosure. It is another case of misidentified property where seven years after closing and one and one-half years after a survey, the buyer quit making installment payments and demanded her money back. The issue was whether she had waived her right to rescind by making installment payments for a year and a half after "...she knew that the land described in her contract was not what she claimed to have purchased." The trial court entered a generous verdict in the alternative whereby the buyer could either pay up and avoid forfeiture of the contract

or walk away from her contract without recovering her payments.

On appeal, the buyer argued "waiver" against the *seller* for having accepted late payments in the past (as if forfeiture was no longer an available remedy for breach.) The court held "...the contention is hardly consistent with the contention that the contract had been rescinded." In *Blake*, there was no evidence of fraud or concealment and the court simply repeated the rule "...that one who seeks to avoid a contract which he has been induced to enter by fraudulent misrepresentation of another, touching the subject matter of the contract, must proceed with reasonable promptitude upon discovering the fraud or the right to rescind will be waived."

Unlike the losing party in *Blake*, the Coes held fast to their right of rescission despite the expense, the sellers' delays and discovery avoidance and claims of incompetency and their own battle against cancer. Also not on-point is Appellants' cite of *Bowman v. Webster*, 44 Wn.2d 667 (1954) which is a case in which purchasers *knowingly* purchased property with boundaries that purchasers questioned; yet they closed and made payments waiving rescission. In *Wilson v. Pearce*, 57 Wn.2d 44 (1960) the buyer failed to plead for rescission. These irrelevant cases involve facts inconsistent with the case at bar.

Starkly contrasting these cases cited, upon being informed of the

extreme erosion damages, Coes immediately sought rescission and, after failed negotiations, filed suit therefore. CP 7-35, 703. None of the cases cited by the Appellants indicate any grounds on which the buyers waived their claim for rescission. Nor do improvements to the residence constitute a waiver. The trial court made no finding that the home had lost square footage or that the value had been damaged by the improvements to residence. Appellants are not damaged by the trial court's holding because the trial court did not award the Coes recovery of the costs for those improvements. CP 951-953.

J. Respondents Are Entitled to an Award of Attorneys Fees and Costs Associated With This Appeal.

Respondents request an award of attorney fees and costs on appeal pursuant to RAP 18.1 and RAP 14.2. The Purchase & Sale Agreement provided for attorney fees on any action "concerning this agreement", and this action "concerns" the Purchase & Sale Agreement. Respondents were awarded attorney fees under the authorities cited in their Memorandum of Equitable Relief by the trial court, and the same authorities would support an award on appeal. *CHD, Inc. v. Boyles*, 138 Wn.App.131, 141, 157 P.3d 415 (2007). Attorney's fees and costs are awarded when authorized by a private agreement, statute, or a recognized ground of equity where the action, as here, arose out of the contract and the contract was central to the

dispute. *Hill v. Cox*, 110 Wash.App. 394, 412, 41 P.3d 495 (2002); *Seattle-First Nat'l Bank v. Washington Ins. Guar. Ass'n*, 116 Wash.2d 398, 413, 804 P.2d 1263 (1991); *Western Stud Welding, Inc. v. Omark Indus., Inc.*, 43 Wash.App. 293, 299, 716 P.2d 959 (1986); *Tradewell Group, Inc. v. Mavis*, 71 Wash.App. 120, 130, 857 P.2d 1053 (1993).

An action is "on a contract" if the action arose out of the contract; and if the contract is central to the dispute. *Deep Water Brewing, LLC v. Fairway Resources, Ltd.*, 152 Wn.App. 229, 278, 215 P.3d 990 (2009) (citing *Hemenway v. Miller*, 116 Wn.2d 725, 742-43, 807 P.2d 863 (1991) and *Seattle-First Nat'l Bank v. Wash. Ins. Guar. Ass'n*, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991)); *see also Hill v. Cox*, 110 Wn.App. 394, 411-12, 41 P.3d 495 (2002) and *Brown v. Johnson*, 109 Wash.App. 56, 34 P.3d 1233, 1234 (2001) (citing *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wash.App. 834, 855, 942 P.2d 1072 (1997)).

In the instant case, the basis for the request is supported by the equitable nature of the remedy and the underlying contract from which their claims arose. *Hackney v. Sunset Beach Investments*, 644 P. 2d 138 (1982).

IV. CONCLUSION

For the reasons set out above, Respondents respectfully request that the Court affirm the trial court's partial summary judgment order and grant of

rescission relief and payment of the court-awarded and unpaid sanction and unpaid guardian ad litem fees advanced by Plaintiffs' Counsel. The exhaustive records provided in support thereof fully support the Respondents' request, and Appellants' arguments fail to raise an issue of material fact which would preclude the entry of judgment, which was appropriate as a matter of law.

DATED this 19th day of December, 2013.

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